

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF MARYLAND
3 GREENBELT DIVISION

4 GENERAL CONFERENCE OF SEVENTH-DAY)
5 ADVENTISTS, an unincorporated)
6 association, et al.,)
7 Plaintiffs,)
8 vs.) Docket Number
9 CLEVELAND L. HORTON, II, in his)
10 official capacity as Acting)
11 Executive Director on Civil Rights,)
12 et al.,)
13 Defendants.)
14)

15 TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING
16 BEFORE THE HONORABLE THEODORE D. CHUANG
17 UNITED STATES DISTRICT COURT JUDGE
18 THURSDAY, FEBRUARY 20, 2025, AT 2:30 P.M.

19 APPEARANCES:

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31 (Appearances continued)

32 ***COMPUTER-AIDED TRANSCRIPTION OF STENOTYPED NOTES***

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1 P R O C E E D I N G S

2 (Court called to order.)

3 **DEPUTY CLERK:** All rise. The United States District
4 Court for the District of Maryland is now in session. The
5 Honorable Theodore D. Chuang presiding.6 **THE COURT:** Thank you, everyone. Please be seated.7 **DEPUTY CLERK:** The matter now pending before this
8 court is Civil Action Number TDC-24-2866, General Conference of
9 Seventh-Day Adventists, et al., versus Cleveland L. Horton II,
10 et al. We are here today for the purpose of a motion for
11 preliminary injunction.

12 Counsel, please identify yourselves for the record.

13 **MR. BAXTER:** Good morning, Your Honor. Eric Baxter
14 on behalf of the plaintiffs, here with my colleagues Nick
15 Reaves and Todd McFarland.16 **THE COURT:** Okay. Good morning -- good afternoon.17 **MR. SEGAL:** Good afternoon, Your Honor. Joshua Segal
18 on behalf of the defendants, here with my colleague, Jeffrey
19 Luoma.20 **THE COURT:** Okay. Good afternoon.21 So we're here for a hearing on the pending motions, which
22 are a motion for preliminary injunction by the plaintiffs and a
23 motion to dismiss by the defense. They are cross motions, but
24 I think the briefing began with the plaintiffs. So we'll think
25 we'll start with them.

1 My general thought was -- I mean, there's a number of
2 issues here. I don't usually set a firm time limit. I usually
3 start off saying it may just be about 20 minutes a side, but it
4 usually will go longer, because I do have a number of
5 questions, and I'm not going to cut you off if we're still
6 working on questions that I have an interest in getting an
7 answer to.

8 So after we hear from the plaintiffs, we'll try to make
9 sure the defense gets equal time, if they need it or want it.

10 And then I will give -- I think I ordinarily give the
11 moving party a brief opportunity for rebuttal, unless the
12 timing has just gotten so unbalanced. But technically, there's
13 a cross motion. So maybe everybody will get a very quick
14 second round. But don't count on too much for that. Let's try
15 to get it out in the first round.

16 So why don't we start with the plaintiffs.

17 Mr. Baxter?

18 **MR. BAXTER:** Thank you, Your Honor, and good
19 afternoon. Eric Baxter on behalf of the plaintiffs. May it
20 please the Court.

21 Your Honor, before March of 2021, I'm not aware of any
22 court anywhere ever holding that religious organizations could
23 be sued for religious hiring. And that's because it's not
24 invidious discrimination. It's common sense that religious
25 organizations want believers to help carry out their work.

1 But in March 2021, the Washington Supreme Court ruled that
2 some religious hiring by religious organizations violated its
3 state's constitution. And in August 2023, the Maryland Supreme
4 Court followed. Even though the Maryland Fair Employment
5 Practices Act, or MFEPA, has explicitly protected religious
6 hiring for 60 years with no problem, the Maryland court
7 essentially reconstrued the law so that now almost every hiring
8 decision by plaintiffs is open to a lawsuit over whether it
9 directly furthers a core mission of the church.

10 **THE COURT:** Can I just ask a history question? Maybe
11 you know -- maybe I should know the answer, but when you say it
12 changed -- I mean, what was the status before? Was there a
13 case that was overruled? Was it just something that had never
14 been challenged?

15 **MR. BAXTER:** Well, in Washington?

16 **THE COURT:** No, in Maryland.

17 **MR. BAXTER:** In Maryland? In Maryland, the *Montrose*
18 decision by the Maryland then Court of Appeals, now Maryland
19 Supreme Court, had ruled when Montrose School here in
20 Montgomery County --

21 **THE COURT:** Montrose Christian, yes. Kevin Durant's
22 school.

23 **MR. BAXTER:** Yes, yes.

24 Dismissed teachers who weren't Baptist. Those teachers
25 sued, and the Court applying minist- -- church autonomy

1 doctrines that the church could not be -- or the school could
2 not be penalized for not retaining teachers who didn't adhere
3 to their faith. That was under a Montgomery County regulation.
4 They said you could only restrict hiring to religion for your
5 religious activities.

6 And then the Maryland Supreme Court basically struck the
7 four religious activities provision saying that that would
8 violate the free exercise clause in church autonomy doctrines.
9 Now -- so that was -- that was the status quo.

10 And Maryland's law, for 60 years, has provided, very
11 broadly, that religious organizations can hire individuals of a
12 particular religion, and was recently added specifically to say
13 that included they were exempt from lawsuits for -- under
14 sexual orientation and gender identity discrimination.

15 And if you look at the *Doe* decision by the Maryland
16 Supreme Court, it essentially said that it just believed that
17 the Legislature would no longer believe that the exemption
18 should be that broad. And on that ground, it essentially
19 rewrote the exemption -- the exemption.

20 Now, that's true even though most Maryland employers are
21 entirely exempt from MFEPA, even for the most invidious
22 discrimination, because they have fewer than 15 years.

23 Now U.S. Judge Mary Dimke in Washington has already ruled
24 and enjoined Washington's rewritten lobby because such unequal
25 treatment violates the free exercise clause. That's the *Gospel*

1 *Union Mission of Yakima.*

2 **THE COURT:** So maybe you can help me out, because --
3 I mean, I don't blame you for putting every possible theory on
4 paper that you could, but maybe you could perhaps prioritize
5 them. Where do you think your arguments are the strongest to
6 focus on, particularly when you're asking for a preliminary
7 injunction? You don't need to actually be able to succeed on
8 all theories, you only need one. But you have to have one,
9 so -- in terms of likelihood. So where is your -- which of
10 these is your best argument?

11 **MR. BAXTER:** Yeah, I think our two main arguments are
12 church autonomy argument and our free exercise argument.

13 **THE COURT:** And you're only actually seeking the
14 injunction on the first three, right? Counts One, Two, and
15 Three. Or among those options.

16 **MR. BAXTER:** That's correct.

17 **THE COURT:** Okay. Go ahead.

18 **MR. BAXTER:** Under the church autonomy doctrine, the
19 Supreme Court has recognized that religious hiring is, quote,
20 the very means by which a religious community defines itself.
21 That's the *Amos* decision by the United States Supreme Court.

22 And you think about here, Seventh-Day Adventists have
23 distinct beliefs around their beliefs in Jesus Christ, their
24 sabbath observance, their tithe pain, their health code, and
25 these beliefs define who they are as a religious organization.

1 And forcing them to hire, for example, individuals who may have
2 converted to Catholicism or to atheism, or who don't observe
3 the sabbath completely, changes the nature of the environment
4 they wish to create within their organization.

5 It also changes the message they want to send to other
6 members of the church, members of the church who are
7 sacrificing to pay tithes, for example, who may be struggling
8 in their own employment to find work that will honor their
9 Saturday sabbath observance.

10 And the message that it would send if -- if the church is
11 hiring individuals who don't even observe the sabbath, who
12 aren't even Seventh-Day Adventists, sends a message to members
13 the church is insincere about its religious beliefs.

14 **THE COURT:** So can I ask -- this was one question,
15 and maybe you're getting to the area where I should ask it is,
16 are you saying that it is part of the Seventh-Day Adventists'
17 core beliefs, their doctrine, what have you, that to properly
18 exercise their religion -- or it would violate their beliefs to
19 hire someone who is not a member? And if so, where does that
20 come from, that form of belief?

21 Or is it that they don't believe they can -- by
22 effectively requiring them to hire people who aren't, that
23 undermines their other -- their ability to exercise their
24 broader beliefs, and that's sort of interfering with their
25 beliefs, rather than being a belief?

1 Can you clarify which it is?

2 **MR. BAXTER:** I think it's more of the latter, Your
3 Honor.

4 And under the church governance doctrine, both the Supreme
5 Court and the Fourth Circuit have defined it as the ability to
6 control your internal governance: How you control your
7 membership, how you create your religious environment, the kind
8 of policies that you apply, how you discipline members.

9 Here, we know the Supreme Court held back in 1872 in the
10 *Bouldin v. Alexander* case that religious organizations'
11 decisions to, for example, discipline a member by
12 excommunicating them even from the church cannot be questioned
13 by a court.

14 It follows that churches can't be forced to hire people
15 that they would excommunicate from their church for the more
16 sensitive duties of actually carrying out the mission, setting
17 an example for the other followers.

18 **THE COURT:** So on the church autonomy piece, though,
19 am I right, though, that ministerial exception is a subset of
20 that, or at least that was the theory under which it was
21 adopted. And while I understand that's a different situation
22 where -- you're only asking for an exemption from religious
23 discrimination claims, I assume, not other forms, correct?

24 **MR. BAXTER:** That is correct.

25 **THE COURT:** Which is what the ministerial exception

1 provides, is an exemption from all discrimination claims.

2 **MR. BAXTER:** Ministerial exception is much broader
3 and is limited to a very select set of individuals.

4 Now, defendants have argued that the ministerial exception
5 should be limited to that. That's clearly not correct. As
6 recently in *Our Lady of Guadalupe*, the Supreme Court held that
7 the ministerial exception is a, quote, component of the broader
8 ministerial doctrine. And it talked about --

9 **THE COURT:** Well, if that's the case, how come this
10 has never gotten beyond ministers for that purpose? I mean, it
11 seems as if the church autonomy doctrine would cover all
12 employees, or something larger than ministers -- and, frankly,
13 some of these findings under the ministerial exception have
14 been people who you wouldn't call the minister or something. I
15 mean, many of these teachers, and they fit within the
16 exception, but if the exception was as broad as you would like
17 it to be, why -- why wasn't it defined as sort of all employees
18 or everyone who is sort of significant, rather than -- minister
19 sounds like a quite narrow category, which includes people who
20 are teaching the faith. And I think you're acknowledging not
21 everyone you're trying to cover through your proposal is
22 actually teaching the faith.

23 **MR. BAXTER:** Well, your Honor, there are a lot --
24 there are a lot of cases that have held that -- have upheld
25 kind of hiring -- or termination or hiring based on religious

1 principles. The real question is why are there no cases saying
2 that that's a violation of nondiscrimination law.

3 So for 60 years, almost every state in the nation has had
4 nondiscrimination laws, and almost all of them have -- or the
5 vast majority of them have exemptions specifically for
6 religious hiring. Title VII has always included an exemption
7 for religious hiring.

8 **THE COURT:** And has that always been interpreted to
9 cover everyone in the way that you're asking for here?

10 **MR. BAXTER:** Well, when it was first adopted, it only
11 applied to the hiring of individuals of a particular religion
12 to carry out the religious activities of the organization.
13 That was in 1964.

14 By 1972, Congress recognized that was a problem and said
15 it's for any activities for reasons, if you look at the
16 legislative history, that they were concerned about impeding
17 upon the internal religious autonomy of these organizations.

18 And so courts have widely held that this extends down to
19 people -- to individuals who are outside of the ministerial
20 exception. You can see that from the Court's *Amos* decision
21 back in the 1980s where this was a -- this was a building
22 engineer for the Church of Jesus Christ Latter-Day Saints who
23 was in charge of a gymnasium facility for -- that was open to
24 the community for exercising. And the Court recognized that it
25 was vital, even in that circumstance, for -- in Justice

1 Brennan's opinion, vital for -- that only believers carry out
2 these activities.

3 So there was a substantial potential for chilling the
4 religious practice if religious organizations had to be looking
5 over their shoulder or considering with every position that
6 that position would be deemed sufficiently religious or
7 sufficiently important for the church to carry out.

8 **THE COURT:** Was that case in your brief? I'm looking
9 for the cite here.

10 **MR. BAXTER:** Yes, I can give you the cite. It's
11 *Presiding Bishop*. It's in the index under *Presiding Bishop*.

12 **THE COURT:** Okay. I got you. Okay. Hold on a
13 second.

14 **MR. BAXTER:** Well, I'm --

15 **THE COURT:** Give it to me again because I'm not
16 finding it in the table.

17 **MR. BAXTER:** Let me see if I've got it here. I'm
18 pretty sure we've cited it a couple of times in there, but -- I
19 may have to give that to you, Your Honor. Maybe one of my
20 colleagues can pull it up for me here.

21 But the other case that I think the Supreme Court goes --
22 the Supreme Court decision that goes to this issue is the
23 Supreme Court's ruling in *NLRB v. Catholic Bishop*, where the
24 NLRB wanted to organize -- thank you. Yeah, the *Amos* case is
25 483 U.S. 327.

1 In *NLRB v. Catholic Bishop*, the NLRB wanted to organize
2 nonreligious teachers at religious schools, so they are talking
3 about PE teachers, math teachers. And the Court said that
4 there was a significant risk that the First Amendment would be
5 infringed. The very process of inquiring into these employment
6 decisions, the courts would have to ask, you know -- basically
7 the Court said every aspect of these teachers' work would be
8 infused with religious policies of the schools.

9 And the courts would have any question that the union
10 might want to get into would potentially infringe upon their
11 religious activities and beliefs.

12 Now, both of these -- now, neither of these cases directly
13 address the question, but they've both become the standard law
14 that's recognized in circuits around the country.

15 The D.C. circuit --

16 **THE COURT:** For what principle? How would you --

17 **MR. BAXTER:** For the principle that this kind of --
18 that inquiring into the religious hiring practices of a
19 religious organization would violate the church autonomy
20 doctrine and principles of entanglement.

21 If you look at the *Great Falls* and *Duquesne* decisions, for
22 example, in the D.C. circuit, and the *NLRB*, in a number of
23 decisions have consistently resisted efforts to unionize
24 smaller and smaller subsets of employees at religious schools
25 on the ground that doing so would interfere with the religious

1 hiring practices of these organizations.

2 I think the *Bryce* decision out of the Tenth Circuit is the
3 other main decision in the circuit courts where the Court
4 addressed -- was facing defamation claims to individuals. A
5 lesbian couple alleged defamation against the church based on
6 statements that the church had made in disagreement with their
7 lifestyle.

8 And the Court said even though one of them was a youth
9 minister, the other was not a member of the church or an
10 employee of the church, the Court held that notwithstanding
11 ministerial status, it didn't even look at that question, it
12 said that the church -- the broader church autonomy doctrine
13 protected the internal governance and decisions, discussions
14 that were --

15 **THE COURT:** So that case was -- you're right that
16 that came up. But it seemed to come up sort of saying, well --
17 I don't think that court said, look, you can't bring this kind
18 of claim, a sexual harassment claim. They said that, well,
19 given the type -- the facts of your claim, it's going to
20 create -- cause us to have to wade into these issues, and that
21 was, I guess, fatal to that particular claim.

22 But I don't believe they suggested there was a broad rule
23 that -- you know, that the church autonomy notion prevents any
24 kind of claim. It seemed to say that, well, sometimes it's
25 going to create an issue, and when that happens, you know, the

1 claim can't -- can't proceed.

2 So why didn't -- I mean, I think that's what it said.

3 But, I mean, again, if there was a broad principle, why
4 wouldn't it just say so, and just say, look, we don't need to
5 worry about the niceties, this is just -- you know, any kind of
6 an employment claim from a -- from an employee, you know, that
7 involves religion is going to fail.

8 **MR. BAXTER:** Your Honor, we're not asking -- we're
9 not asking for broad immunity from claims. The church and
10 organizations like it have always been subject to claims for
11 discrimination, for example, on the basis of race or sex. And
12 all we're asking is a return to that rule.

13 If an employee can bring a claim on those grounds, if the
14 church has a religious reason, there's a dispute whether the
15 firing was based on a religious reason or a protected reason,
16 then there's a pretext analysis. The --

17 **THE COURT:** Actually, I think you're describing
18 something different than what I thought the brief was asking
19 for. I thought what you were asking for was a rule that if
20 someone -- if the church wants to hire based on religion or
21 saying you have to be a member of our religion to be hired, you
22 could do that. Basically, it's a matter of the Constitution,
23 because they have -- we're not interpreting the statute.
24 That's the State Supreme Court's decision, but we could say
25 that that interpretation violates the Constitution.

1 Now, what I hear you saying is you want to go beyond that
2 and say if someone brings a claim of race discrimination, sex
3 discrimination, disability discrimination, and you can kind of
4 explain that there's a religious reason for that, then the
5 claim fails. Those are two different things.

6 **MR. BAXTER:** No, I -- what I'm saying is, there's
7 always been a rule that individuals -- that religious
8 organizations can hire for religious reasons. It's rarely been
9 tested because it happens all the time. It's common sense that
10 religious organizations, just like any other advocacy or
11 ideological organization, would require its employees to
12 believe in what it's advocating. That's especially true for
13 churches, which the Supreme Court has said are the
14 quintessential --

15 **THE COURT:** But can you just clarify, which one is
16 it? Are you just asking to say if we are going to require
17 everyone to be a Seventh-Day Adventist, you want that to be
18 deemed legal, is that all you're asking for? Or are you also
19 asking for the ability to identify a religious reason that
20 would trump any other kind of discrimination claim, even though
21 you've just said that churches are subject to other kinds of
22 discrimination claims other than for ministers?

23 **MR. BAXTER:** Well, there's a variety of different
24 situations, right? There's a situation where someone is fired
25 for a religious reason, or not hired, and they admit that it

1 was for a religious reason. That would be protected by the
2 church autonomy doctrine.

3 There are other circumstances where a church fires someone
4 for a religious reason, the plaintiff claims that it was for a
5 different reason. Those claims have always been allowed to go
6 forward.

7 The plaintiff, under standard employment nondiscrimination
8 law, has the burden to come up with evidence that there was a
9 nonreligious reason, and then the burden flips back to the
10 church to show that that was not -- that their religious reason
11 was not pretextual. So we're just asking to have that same
12 rule in place like it always has been.

13 **THE COURT:** Is there a case that lays out that -- as
14 you said, perhaps this doesn't really -- well, the scenario of
15 someone -- I mean, I thought this was easier than I thought it
16 was. I thought it was just, you know, we want to hire people
17 of our religion; if you are, we can hire you. If not, we
18 can't; you can't sue us for saying that, you know, you weren't
19 of this religion.

20 **MR. BAXTER:** That's all we're asking for.

21 **THE COURT:** Now -- well, no, now you're asking for
22 some sort of doctrine saying that the Constitution requires
23 that we have this sort of analysis where religion is a defense
24 to any kind of claim. And I'm not sure that's the same thing.
25 It may, in practice, be the same thing in many instances, but I

1 think that's a little bit different.

2 **MR. BAXTER:** We're not asking the Court --

3 **THE COURT:** You know, for example, you've tried to
4 say that there's certain -- I think there's a very different
5 issue when you're trying to challenge what the statute says.
6 To me, that's about are you a member or are you not?

7 Now you're saying, well, you said something that our
8 belief system disagrees with, even though you're a member,
9 presumably, because maybe you've gotten through that first gate
10 point, and now we're going to fire you over that. And I'm not
11 saying that that wouldn't be permissible, but I think that's
12 just a different question. That's almost like saying we want
13 to extend the ministerial exception to everybody.

14 So I guess I'm concerned that there's a slippery slope
15 here, not just in general, but in this case as well.

16 **MR. BAXTER:** Your Honor, that's already the law.
17 We're not asking this Court to rule on that or to change
18 anything about that.

19 There's always been a rule that, for example, if the
20 church hired an individual because -- she got pregnant and she
21 was unmarried, the church fired that individual, they can't
22 just say we have a religious reason and that's the end.

23 The plaintiff has the opportunity to show that, for
24 example, the church has not treated men who have engaged in
25 extramarital activity for the same reason. That's the

1 standard -- that's the status quo that the law has always been.

2 **THE COURT:** So we're back to just are you a member or
3 are you not?

4 **MR. BAXTER:** We're not asking -- even -- I thought
5 you would ask what would happen in that type of situation. And
6 my point is, we're not asking for a different rule than has
7 always been the rule.

8 We're just saying now the Maryland Supreme Court has
9 interpreted the law to say that you can't even advertise for
10 religious -- you know, for religious compliance. You can't
11 hire or fire for religion compliance. You can't have
12 enforcement activities based on religious noncompliance. And
13 that's where we say the church autonomy doctrine protects that
14 specific type of hiring.

15 **THE COURT:** Okay. So let me ask a broader question.

16 **MR. BAXTER:** We wouldn't be asking any other --

17 **THE COURT:** Let me ask a broader question because I
18 think some of this is kind of connecting to this other issue.

19 Is your claim a facial challenge to the statute or an
20 as-applied challenge?

21 **MR. BAXTER:** It's a facial challenge to the extent it
22 bars churches from hiring based on religion.

23 **THE COURT:** So you understand that for a facial
24 challenge, basically if there's some scenario where it's
25 constitutional, it won't succeed? And it seemed to me -- I

1 couldn't tell from the briefing, but I certainly thought, given
2 the belief system that you laid out, that there's sort of two
3 questions; one is as applied to this church, could there be a
4 problem constitutionally, and then there's also is there a
5 broader problem. So you're saying -- you're taking on the
6 bigger problem of whether this is just unconstitutional
7 generally.

8 **MR. BAXTER:** Let me restate that, Your Honor, because
9 I think -- I think whether it's a facial or an individual
10 challenge is really asking for the relief that's sought. We
11 are only asking for relief that the law cannot be enforced
12 against the Seventh-Day Adventist Church.

13 My point is, we don't have an individual situation that
14 we're trying to -- we're saying that every application of the
15 law to our religious hiring would be unconstitutional. And so
16 we're asking for the law, as interpreted by the Maryland
17 Supreme Court, to be enjoined as applied to our hiring
18 practices.

19 **THE COURT:** So it is as applied?

20 **MR. BAXTER:** That's correct.

21 **THE COURT:** Okay. Just want to make sure I
22 understood.

23 Okay. I did want to ask you about the -- well, actually,
24 before we get to -- you've raised the free exercise issue, but
25 I want to ask you about the excessive entanglement argument in

1 Count Two. I'll ask both sides this.

2 I am not certain where we are in the landscape on that
3 type of argument. The *Rayburn* case, which you rely on, which
4 apparently was the same party that's here, too, although many
5 years ago, it raised this concept of excessive entanglement,
6 which, frankly, I'm not sure, practically, is that different
7 than your church autonomy argument. I feel like it's
8 conceptually the same thing, even though the names come up in
9 different places.

10 But where that term came up seems to have been -- and
11 *Rayburn* specifically cites it out of the establishment clause
12 and the *Lemon* test, so it is different -- you're making some
13 kind of establishment-clause argument there.

14 And in the recent *Kennedy* case, they said the *Lemon* test
15 doesn't apply anymore.

16 So how are we to apply this argument when it appears as if
17 that argument doesn't exist as a concept anymore? If you want
18 to do what you used to be able to do in the *Lemon* test, you're
19 now supposed to follow this historical analysis under *Kennedy*.

20 I'm not sure you need the argument because I think it's
21 very similar to the church autonomy argument, but is it
22 separate, and is it still a viable argument in light of what's
23 happened to *Lemon*?

24 **MR. BAXTER:** Your Honor, I do think it's a separate
25 argument. I agree that it's very closely tied into the church

1 autonomy doctrine.

2 The Court has applied entanglement principles in many
3 cases outside of the *Lemon* context, including in cases like
4 *NLRB v. Catholic Bishop*. And so the concept is really a church
5 autonomy, the church -- there's a sphere of independence where
6 the government cannot intrude into the decision-making.

7 And the court, for example, in *NLRB v. Chicago Bishop*
8 [sic] said the very profits of litigation on these issues is
9 entangling because it requiring courts to delve into the
10 importance or non-importance of different religious beliefs
11 imposed by the religious organization.

12 **THE COURT:** So *NLRB* is your best case on that, not
13 *Rayburn*? Well, *Rayburn* -- *Rayburn* brought it out of the *Lemon*
14 test, so that's what I'm troubled by, because, you know, they
15 said that, you know -- I think one of the recent cases said
16 that, you know, the district court applied the *Lemon* test, and
17 that was totally wrong and start over again. And so I don't
18 see a reason to keep down that road unless we need to.

19 And I guess my second question on that is, when you say --
20 I mean, is your entanglement argument establishment-clause
21 argument or a free-exercise argument?

22 **MR. BAXTER:** It's a combination of both, as it is in
23 the ministerial exception context. The Court said it leans on
24 both.

25 **THE COURT:** Well, the ministerial exception relies on

1 church autonomy, which relies on both.

2 So, again, I guess -- I'm just trying to streamline this
3 process. I'm not sure why you even need that.

4 But to the extent you do, the only place I see that term
5 tracing back to is *Lemon*. But you're saying *NLRB* has it
6 freestanding and not derived from *Lemon*?

7 **MR. BAXTER:** I don't believe the Court cites *Lemon* in
8 that case; I'm not a hundred percent certain, Your Honor. But
9 I know courts have continued to view entanglement as a distinct
10 principle just simply for the basis that it interferes in the
11 ability of religious organizations to --

12 **THE COURT:** Well -- but in *Lemon*, it wasn't
13 sufficient by itself to find something to violate the
14 establishment clause.

15 **MR. BAXTER:** Sure. If the Court is not comfortable
16 entering that path, then I think you're right, we don't need
17 that as an independent grounds.

18 And if I could turn to the free-exercise clause, Your
19 Honor.

20 **THE COURT:** Sure.

21 So on that one, you mentioned these exceptions. And I'm
22 curious. I mean, I see the logic in the argument. You got the
23 15 employees, you have the seniority systems and so forth. I
24 think the other side's argument was, well, these are
25 exceptions, but they are open to both religious and

1 nonreligious activities. You could have a smaller religious
2 institution of 15 or less and they have no issues. You could
3 have a church that has a seniority system, and they would be
4 able to take advantage of that.

5 So I'm not sure the law is clear on this, because this
6 whole area, I think, goes back to *Tandon*. It's not that far
7 back in the past.

8 But is there anything that helps to elucidate what you do
9 with an exception that is available to both secular and
10 nonsecular activities, whereas the issue in *Tandon*, I think,
11 was there was some activities that were clearly secular and
12 were favored over religious activities.

13 **MR. BAXTER:** And I think that *Tandon* is one of the
14 best cases that explains it. The Court has addressed this
15 issue four times in the last five years.

16 **THE COURT:** Uh-huh.

17 **MR. BAXTER:** In the *Dioceses of Brooklyn* case, in
18 *Kennedy v. Bremerton*, in *Fulton v. City of Philadelphia*, and in
19 *Tandon*.

20 And in *Tandon* in particular, the Court specified that what
21 you're looking at is not the superficial labels that the
22 government places on different activities, but you look at what
23 is the underlying interest that the government is trying to
24 assert.

25 Here, it's an interest in nondiscrimination.

1 And the Court allows discrimination for -- for employers
2 who have fewer than 15 employees, which covers more than --
3 around 80 percent of the employees in the state of Maryland.
4 All of these other exceptions, it said it's okay to
5 discriminate in these contexts.

6 And the Court said you can't then say, well, you -- you
7 can't deny the same kind of an exemption for religious
8 organizations.

9 And in *Tandon*, the Court said it doesn't even matter if
10 some secular organizations are treated the same as religious
11 organizations, it's that the fact that the Court is not
12 applying its interest evenly. It's choosing -- it's picking
13 and choosing where it will apply the interest, and that
14 triggers strict scrutiny.

15 **THE COURT:** So even though any religious entity with
16 15 or less people is exempt under that same provision, you're
17 trying to argue that the mere fact that they have created that
18 exemption for small businesses or small entities -- and I don't
19 think anyone is arguing that's an antireligion exemption, are
20 you -- you're not trying to argue that, right?

21 **MR. BAXTER:** You don't have to say it's antireligion.

22 **THE COURT:** I know. But -- but you do -- well, at
23 least as I read *Tandon*, maybe you can tell me which of these
24 other cases is more clear on this point, I read it to say that
25 it was secular activities versus religious.

1 So where does it say that even if it's a neutral
2 exception, and I think the 15 or less is a perfect example,
3 that could apply to any kind of entity, that that, in and of
4 itself, moves us into strict scrutiny? Once you allow anyone
5 out of a hundred percent of the universe to not be covered by
6 this, then we're in strict scrutiny land?

7 **MR. BAXTER:** I think *Tandon* itself emphasizes that by
8 saying that it doesn't matter if some secular organizations are
9 treated the same as the religious organizations. The question
10 is, is --

11 **THE COURT:** But these aren't secular organizations.
12 These are -- these very well could be religious. I mean, maybe
13 not yours, you have a very large --

14 **MR. BAXTER:** Right.

15 **THE COURT:** But you could have a sub-entity that has
16 15 or less, like an individual, you know, church, or, you know,
17 another group of a different background could have that.

18 So I guess you're asking for an interpretation of *Tandon*
19 to say that even if the rule applies to any religious or
20 nonreligious entity, and it doesn't not only favor something
21 that's secular, that we're -- I mean, I am not sure when you
22 would ever not be in strict scrutiny if that were the rule.
23 Because there's always an exception somewhere for something.

24 **MR. BAXTER:** So far, the Supreme Court has always
25 found that there was something that would trigger -- in all of

1 those cases there would be something that triggered strict
2 scrutiny. And that's because the government is showing that
3 its interest is not really so strong that it couldn't depart
4 from a for-religious organization.

5 That was what the Court said in the *Fulton v. City of*
6 *Philadelphia* case, that once the Court granted some exemptions,
7 it showed that its -- its argument that it could brook no
8 departure was undermined by having granted some exemption.

9 **THE COURT:** Okay. So I understand the argument, and
10 you're right, it does come down to what the cases say. And I
11 can see the logic of that, whether it's 15 people, or this
12 union -- or rather, the seniority rule system.

13 But what about the bona fide occupational qualification
14 category, do you see that as a stronger or weaker argument than
15 what you're saying about these 15? Because, you know, it's
16 framed differently in the statute. And to me, that one isn't
17 really sort of creating an exception for either an individual
18 or a category. To me, that's just defining what the -- whether
19 something is -- you know, the element of whether there is
20 discrimination or not, at least that's how I think of it.

21 **MR. BAXTER:** Right. And still -- I think that even
22 lies even more closely with the *Fulton v. City of Philadelphia*
23 where the Court said where there's any mechanism in the statute
24 that gives the government discretion to make an exception, that
25 also triggers strict scrutiny. And --

1 **THE COURT:** But how is that different from
2 saying if -- if we require a showing of intent to discriminate,
3 that there's obviously discretion as to whether someone decides
4 there's intent or not. I mean, someone has to decide whether
5 you're discriminating because whether you have an animus, or
6 you're discriminating because you actually need someone in this
7 role who has a qualification. To me, it's not that different
8 than having an intent requirement.

9 So you're saying that just because somebody has to make a
10 fact-finding, frankly, more likely a court in the end, on some
11 factual element, either that they intended to discriminate or
12 not, or this person -- this job can only be done by someone who
13 is of a certain background, which, therefore, frankly, means
14 there was no intentional discrimination, that just having,
15 basically, any elements means it's not covered?

16 **MR. BAXTER:** And it doesn't mean that the church or
17 the religious organization always wins. It just shows that the
18 government, there's enough there -- why is the government
19 exempting some activity or some groups and not religious
20 organizations? There's enough there to say, well, let's ask
21 the government then to prove why it can't accommodate a
22 religious organization.

23 And so it's not a religion-wins-all provision. It just
24 says once the government starts making exceptions, whether they
25 are categorical exceptions or discretionary exceptions, in

1 *Fulton*, the Court said it didn't even matter that the
2 government had never granted an exception. The fact that it
3 had a mechanism for doing that was enough to then ask the
4 government to justify why it couldn't give an exemption for a
5 religious organization. And that's all we're saying here.

6 **THE COURT:** Sure.

7 So I understand, then -- I mean, I understand the
8 argument. And am I right, though, you need that argument to
9 succeed, to succeed on free exercise?

10 Because if not, you're in the rational-basis land, and
11 you're not going to argue that you can win under that standard,
12 are you?

13 **MR. BAXTER:** Well, I would argue that we could win
14 under rational basis because there's no invidiousness. Hiring
15 for religion by a religious organization, it would be -- I
16 mean, this is -- it goes back to cases as early as the
17 *NCAAAP v. Button* case, where the Supreme Court recognized that
18 hiring attorneys was expressive association because the
19 organization was devoted to a certain cause and needed
20 employees who would further the work of that organization.
21 This happens all the time in ideological organizations. And it
22 would be irrational for a court to say that religious
23 organizations can't prefer believers to carry out the work of
24 the organization.

25 And that's why these cases have never -- have rarely

1 arisen.

2 And I think the bigger question is why can't the
3 government come up with any case showing that -- that religious
4 organizations can be forced to hire individuals who disagree
5 with their faith, who aren't members, who would -- who could
6 introduce dissent and, you know, violation of basic church
7 principles into an organization whose entire purpose is to
8 carry out these principles.

9 And so I think that's the bigger question in this case,
10 is, you know, where are those cases if there isn't this right
11 for religious organizations? And it's just common sense.

12 So, yes, I would argue that we would win even under *Smith*
13 for a rational basis.

14 **THE COURT:** Obviously harder, though, right? I mean,
15 naturally.

16 Let me ask, you were talking about cases and whether the
17 government can find any -- the one area I was interested in
18 is -- and I know this isn't one of your preliminary injunction
19 arguments, it's really under the government's motion to
20 dismiss, but expressive association, I mean, it -- certainly
21 it's a right.

22 The question is, usually we're talking about questions of
23 who can be your members, who is going to be a member, who is
24 not going to be a member of either a -- could be a religious
25 organization, but also could be a -- in many cases, they are

1 nonreligious.

2 Here, we're talking about employees. Do you have any
3 authority or cases that give examples under which sort of it's
4 extended not just to the idea of who are -- who are your
5 members of your association as opposed to employees? I mean,
6 is there an example of that that you can point me to?

7 **MR. BAXTER:** Yeah, the case I just mentioned, *NAACP*
8 *v. Button*, which is at 371 U.S. 415, where the Supreme Court
9 held that hiring associates for litigation, quote, may be the
10 most effective form of political association.

11 Every -- there are a number of -- I would point the Court
12 to the Second Circuit cases, *Slattery v. Hochul*, which we've
13 cited in our brief, and is found at 61 F.4th 278. These were
14 religious pregnancy care centers. And the Court held that
15 compared -- compelled hiring would affect in a significant way
16 the group's ability to advocate its viewpoints. That was
17 sufficient in that case to overcome a motion to dismiss.

18 Just in January, in *CompassCare v. Hochul*, which is at 125
19 F.4th 49, the Second Circuit, again, said that -- denied or
20 overturned a dismissal on a motion to dismiss and remanded for
21 the church and a religious organization to be able to show that
22 they had a core mission and that it would be affected by the
23 law that prohibited employment decisions based on reproductive
24 health decisions.

25 **THE COURT:** Sorry, say that again. Employment

1 decisions based on --

2 **MR. BAXTER:** So this is a New York law that prohibits
3 discrimination on the basis of reproductive health decisions,
4 so if an individual decided to use IVF or have an abortion.

5 And these were religious organizations with religious
6 beliefs against that. And the Court said they had the right to
7 prove that this was a part of their core mission, and that
8 hiring individuals who didn't support that mission would --
9 would impede their mission.

10 **THE COURT:** So are those cases, *Slattery*, *Compass*,
11 *Button*, are those cases under this free -- expressive
12 association right --

13 **MR. BAXTER:** Yes.

14 **THE COURT:** -- or some other First Amendment vehicle?

15 **MR. BAXTER:** These are free -- these are
16 expressive -- I mean, *NAACP* spoke broadly about speech and
17 expressive speech.

18 **THE COURT:** Okay.

19 **MR. BAXTER:** But *Slattery* and *CompassCare* are
20 specifically expressive association cases. And both -- in both
21 those cases, there was a motion to dismiss granted at the
22 district court level and reversed by the Second Circuit.

23 **THE COURT:** Okay. So going back a little bit to the
24 as-applied versus facial, am I correct that -- do you see
25 any -- I mean, we have -- in addition to your motion for

1 preliminary injunction, we have a motion to dismiss.

2 And so obviously on a motion to dismiss, you take the
3 light -- the facts, you know, in the light most favorable to
4 the plaintiff. But given that you're focused primarily on
5 whether your organizations can be -- can get the rule you're
6 focused on, do you see factual issues here that would lend --
7 you know, there would be a need either for discovery or actual
8 presentation of facts before a final decision is made? Or is
9 it really just a legal question?

10 **MR. BAXTER:** I think these are largely legal
11 questions. I mean, the Court, I think, could rule for the
12 plaintiffs on legal grounds. I think if it wanted to rule for
13 the defendants --

14 **THE COURT:** Kind of in a -- sort of a facial kind of
15 way, just saying this would -- it doesn't really matter what
16 your individual situations are. Right.

17 **MR. BAXTER:** At the motion to dismiss stage.

18 But if -- I think on some of the claims, at least, the
19 plaintiffs would reserve the right to be able to introduce
20 evidence showing that the nature of their religious belief and
21 how it would be impacted if -- if they were not allowed to
22 engage in religious hiring.

23 **THE COURT:** So being able to flesh out what's in the
24 complaint itself already if more detail was needed?

25 **MR. BAXTER:** Correct.

1 **THE COURT:** Okay. So that might be an issue for a
2 motion to dismiss, is -- to the extent there might be a reason
3 to get those additional facts, you wouldn't dismiss, I would
4 assume, so -- okay.

5 Okay. I think I may have co-opted most of the time, but I
6 think we've covered most of the issues that I had questions
7 about.

8 Is there anything that we didn't cover that you had meant
9 to offer up?

10 **MR. BAXTER:** Your Honor, I could go through the other
11 claims on which the State has moved to dismiss, but I'm happy
12 to let them make their case and respond to it. I think they
13 have failed to state -- explain the basis on which these counts
14 could be dismissed under any of them. But, again, I'm happy to
15 let them make their case and respond on --

16 **THE COURT:** Actually, one question I did have was, I
17 guess it could be under several of these claims, but I'm
18 thinking of it under expressive association and perhaps your
19 church autonomy theory.

20 One of your issues is, as you raised in the complaint, was
21 that there are -- you know, there's a certain way that the
22 church wants to have the workplace go, and so that's why
23 employees need to -- there's a code of conduct or -- certain
24 things you talked about that align obviously with the religious
25 values; you know, dress, use or nonuse of substances, things

1 like that.

2 Do you agree that under existing law, you could require
3 those things of people without -- whether they are called
4 religious or not, but just saying these are the ways we want to
5 run our workplace, and you could avoid hiring anybody who you
6 knew couldn't meet those requirements or at once working didn't
7 meet the requirements, so that it's not just -- I mean, do you
8 agree with that?

9 **MR. BAXTER:** Like, we have a rule that we don't --
10 nobody works on Saturdays. I don't think that that would work,
11 because the plaintiff could always claim that the reason for
12 that was the religious beliefs of the organization, and the
13 religious organization was penalizing the individual for not
14 following their religious beliefs.

15 So a health code violation, or a failure to observe the
16 sabbath, or not believing in --

17 **THE COURT:** Well, let me give you a different
18 example. This is the one I was more thinking about. You know,
19 you -- thinking about drug use, thinking about the way you
20 dress.

21 You could, and you do in the handbook -- I mean, you could
22 say, look, as a condition of hiring, you got to live by these
23 rules, whether -- I mean, but you don't -- in terms of having
24 to dress a certain way, avoid using certain substances, things
25 like that.

1 Do you agree that you can enforce those rules against
2 anybody with or without this ruling that you're looking for?

3 **MR. BAXTER:** I think some of them, for example,
4 courts have held, recognized that employers can have dress
5 codes while their employees -- employees are at work.

6 Individuals who work for religious organizations are
7 required to live by their religious beliefs whether they are at
8 work or not at work. And I'm not sure that a court would
9 uphold a ruling applied in that context.

10 **THE COURT:** So you're saying that --

11 **MR. BAXTER:** Most of the rulings the churches are
12 concerned about are rules about sabbath observance, tithe pain,
13 belief in Jesus Christ and willingness to follow the teachings
14 of Jesus Christ. And those are rules that you cannot impose on
15 your employees without triggering a potential --

16 **THE COURT:** Okay. So some of them you could. Some
17 of them you could. I would take the position you probably
18 could. But you're saying some of them you could not, either if
19 you really conclude that it's necessary to have employees
20 follow these principles either outside the workplace or things
21 that really just --

22 **MR. BAXTER:** Well, even within the workplace, for
23 example, the church would be required to accommodate other
24 religious beliefs. They would be required to require a Muslim
25 who wanted a prayer room and prayer breaks at certain times.

1 They would have to -- you know, any other kind of accommodation
2 that any other employer would be required to give.

3 **THE COURT:** I don't know. I mean, like you just
4 said, there's this whole other area which we're not really
5 focused on here.

6 You said, well, the way the rules are right now, if we
7 have a religious reason for firing you, even though, you know,
8 you're claiming race discrimination or otherwise, we can do
9 that. And so -- and I'm not as familiar with that, because I
10 don't think that was really a subject of briefing, but --

11 **MR. BAXTER:** No, I want to be clear. I've never said
12 the church can always just have cart blanche to prevail any
13 time it asserts a religious reason. There's always -- that's
14 the pretext analysis, which courts have always said the
15 plaintiff has an opportunity to show that the church is
16 pretextual.

17 If there's a dispute about whether the religion is
18 religious or not, then that case can go to --

19 **THE COURT:** But how is that different from now? You
20 hire someone who is Muslim because -- I mean --

21 **MR. BAXTER:** Right.

22 **THE COURT:** Let's say you think you're required to by
23 the law, once -- you know, you're unable to get this ruling, so
24 then you hire someone who is Muslim, but then you have a rule
25 that says, again, you know, you can't do certain things, and

1 then this person says, well, I'm doing them because of my
2 religion, but you're saying, well, these go against our
3 beliefs --

4 **MR. BAXTER:** Right.

5 **THE COURT:** And so we're not getting rid of you
6 because of animus towards you, it's because you're not
7 following our beliefs.

8 I thought you said earlier that type of argument, if it
9 was genuine and wasn't a pretext, would be successful.

10 **MR. BAXTER:** If the Court enjoins the law as it
11 currently exists. As the law currently exists, the religious
12 organization doesn't have that religious protection. It would
13 have to hire -- it couldn't discriminate in hiring against
14 Muslims. And it would have to hire a Muslim. Once it hired a
15 Muslim, it would be under an obligation under Title VII and the
16 state law to accommodate -- reasonably accommodate that
17 individual's religious beliefs.

18 And so it would not just be -- you know, this is another
19 example of how this completely changes the organization, how it
20 chooses to define itself and carry out its mission. It's
21 absurd on its face, even under rational basis to say that a
22 church like -- a Christian church, for example, would have to
23 accommodate Muslims in its -- in carrying out its religious
24 mission. And that's the problem with this law, is it imposes a
25 bar on religious hiring even though religious hiring is what

1 every religious organization does.

2 **THE COURT:** Well, not necessarily.

3 **MR. BAXTER:** Not a complete bar. Not a complete bar.

4 But it opens every question -- every position, short of
5 ministerial exception, is now open to questions of whether that
6 position directly furthers a core mission of the church.

7 And what directly means, the Court says that could be
8 anything more than one step away from the direct action is no
9 longer direct. It depends on the size of the organization. It
10 depends on how the organization advises the position, how it --
11 who it intends to benefit through that position, how it
12 allocates funding for that position.

13 All of these questions are now questions for the jury,
14 even if the church sincerely believes -- the opinion says even
15 if the church sincerely believes that this position is
16 necessary to be carried out by a believer, that can be
17 questioned by a judge and overturned by a judge or a jury.

18 And so there is nothing that would protect a church from
19 having to hire people who totally -- and not just believe in
20 other faiths, but totally disagree with this mission and would
21 want to internally speak their voice in opposition to that
22 mission.

23 And every other -- every other ideological organization is
24 protected under the expressive association doctrine to hire
25 individuals who will actually carry out -- share and carry out

1 their mission. And that's all we're asking for here, is to
2 return of the status quo before the Maryland Supreme Court
3 changed, reinterpreted the rule that would allow the
4 religious --

5 **THE COURT:** What are you referring to when you say
6 every other expressive organization can do this and the
7 churches can, what were you referring to there?

8 **MR. BAXTER:** What I'm referring to is that, for
9 example, like I mentioned, the NAACP is an advocacy
10 organization that has a particular mission, and in its hiring,
11 it can require its employees to sustain its mission. It's not
12 required to hire, for example, white supremacists to carry out
13 its mission. And --

14 **THE COURT:** Okay. I'm just wanting to understand
15 what the connection was to --

16 **MR. BAXTER:** And there are lots of -- thousands of
17 ideological organizations that are nonreligious around the
18 country that are protected around the free speech and
19 expressive association doctrines to be able to hire in
20 accordance with their mission.

21 And the Maryland Supreme Court's ruling has placed a
22 special disability on religion saying they cannot make the same
23 kind of hiring decisions, and that's unconstitutional under the
24 church autonomy doctrine and under the free exercise clause.

25 And under the free exercise clause, the State cannot show

1 any compelling reason for that -- for that change in what the
2 law has been for the last 60 years.

3 **THE COURT:** Okay. I understand. Thank you.

4 We'll go to Mr. Segal.

5 **MR. SEGAL:** Thank you, Your Honor. Joshua Segal on
6 behalf of the defendants.

7 I want to start, I guess, with church autonomy, if that's
8 okay. And in the context of that church autonomy argument, I
9 sort of want to touch a little bit on the distinction between
10 as-applied and facial, and facial as to these particular
11 plaintiffs, really just to highlight how broad the argument is
12 that they are making, at least in their briefs.

13 Now, the argument they are making in their briefs, at
14 least, is that church autonomy requires that, as a
15 constitutional matter, any employment decision be protected as
16 long as it is rooted in religious belief.

17 Now, that may, of course, amount to a decision to hire
18 only co-religionists, a term the case law frequently uses. But
19 certainly rooted in religious belief is not a term that in and
20 of itself would exclude, for instance, hiring or firing
21 somebody based on race because you believe that that is what
22 your religion requires. And we do not generally question the
23 sincerity of religious beliefs.

24 The -- either there's some reference to the absence of
25 case law compelling religious organizations to hire people who

1 are not of their religion. And I guess in response to that,
2 I'll say a few things.

3 One is -- I think one reason why you don't see case law
4 like that is because, as counsel on the other side correctly
5 pointed out, Title VII does, as a statutory matter, preserve,
6 for religious organizations, the ability to hire and fire based
7 on a preference for co-religionists. And, of course, many, if
8 not most, employment discrimination cases end up arising under
9 Title VII.

10 **THE COURT:** So I wasn't a hundred percent sure. It
11 seemed like I would -- and both counsel agree with this, so,
12 you know, now it clearly says currently Title VII does protect
13 what the plaintiffs, I think, are asking for, at least on this
14 one point of hiring people of your own religion, right?

15 **MR. SEGAL:** Yes. I would say that as a statutory
16 matter, Title VII does protect, with respect to claims under
17 Title VII itself, decisions to --

18 **THE COURT:** Right.

19 **MR. SEGAL:** -- hire or fire based on whether somebody
20 is of the same religion as the hiring or firing organization.

21 I don't --

22 **THE COURT:** And Maryland used to do the same thing,
23 you agree with that?

24 **MR. SEGAL:** I -- there is at least an argument that
25 Maryland used to do the same thing. I think an interesting

1 thing about the *Doe* decision is it doesn't really discuss
2 *Montrose*. But, you know, regardless, we certainly agree with
3 the other side as to the fact that *Doe* is now indeed the law in
4 Maryland.

5 **THE COURT:** Are there any other states that have this
6 situation where -- I guess we've heard about Washington, but
7 are there other states who have this situation where the state
8 law doesn't allow for the kind of religious hiring that Title
9 VII does, and so you might have the same scenario that we're in
10 now, where if someone is -- either has or will challenge it on
11 this grounds, do you know?

12 **MR. SEGAL:** I'm not aware of others.

13 **THE COURT:** Okay. And -- okay. So in terms of this
14 issue, then, is it correct, then, that there's just not a lot
15 on this specific issue because of Title VII and other laws that
16 just sort of made them unnecessary challenges in the past?

17 **MR. SEGAL:** I think that's certainly a reasonable
18 explanation for why there isn't a whole lot on this specific
19 issue.

20 What there also isn't, however, and counsel on the other
21 side said, we have no case compelling religious organizations
22 to hire somebody who is not of their same religion, there is
23 also no case that we have found holding that religious
24 organizations categorically have a right to make all hiring and
25 firing decisions that they want as long as they are rooted in

1 religious belief as a constitutional matter.

2 And, you know, the other side certainly cites some cases
3 extending the church autonomy doctrine beyond the ministerial
4 exception to certain aspects of employment.

5 But I, at least, don't read those cases as conferring the
6 sort of broad right to make all hiring and firing decisions
7 that they want based on -- or as long as they are rooted in
8 religious belief. I don't see those cases embracing that
9 principle so much as --

10 **THE COURT:** So I may or may not -- I may agree with
11 you in part.

12 So the ministerial exception for people in that category,
13 they can do those things, right?

14 **MR. SEGAL:** Absolutely, yes.

15 **THE COURT:** And so that's a pretty clear area where
16 they can do that?

17 **MR. SEGAL:** One hundred percent.

18 **THE COURT:** Arguably, then, you could say, well -- if
19 it's so clear they can do that in that area, and the courts
20 have spent a lot of time defining that area, if you're outside
21 of that area, you can't do the same thing?

22 **MR. SEGAL:** As a general matter, yes. There may
23 be -- there may be edge cases. For instance, the *Bryce* case
24 which is discussed in the briefing.

25 **THE COURT:** Yeah, because as I said to your

1 counterpart, something came up in that case that put them in a
2 very difficult position about church doctrine.

3 **MR. SEGAL:** Correct. And protection for the ability
4 to speak about ecclesiastical matters within the organization
5 is very much at issue there.

6 **THE COURT:** But if that's the case, though -- and
7 again, I think I agree with you up to that point, but I'm
8 pretty confident that the ministerial exception decisions, at
9 least most of them, at least the major ones, the -- the issue
10 was that someone was trying to enforce a provision of Title
11 VII, or the ADA, some statute that was not about religion. It
12 was about disability, about sex, about age, something else, and
13 there really aren't -- I mean, it's not inconsistent with that
14 exception to say, well, there may be a category of -- a limited
15 window for just being able to hire people from your own
16 religion that isn't inconsistent with the ministerial
17 exception, because the ministerial exception covers those
18 situations when you're going beyond just hiring someone from
19 your religion.

20 You agree that that's not intellectually inconsistent?

21 **MR. SEGAL:** I agree with you, Your Honor, there is --
22 there is certainly a way to set that up as intellectually
23 consistent.

24 I think it's -- the spirit of there being a ministerial
25 exception on one hand covering everything, and by everything,

1 that, of course, is shorthand for all reasons for
2 discrimination. And on the other hand, this whole other
3 blanket exception for any hiring or firing decision rooted in
4 religious belief, I would say is inconsistent with at least the
5 care with which the Court -- the Supreme Court exercised in
6 delineating the scope of the ministerial exception.

7 You're absolutely right, Your Honor, that the Court
8 doesn't say categorically, like, and that's it for employment.

9 **THE COURT:** But is there any case that says anything
10 that at least strongly suggests that this is the limit, or -- I
11 mean, I don't -- I'm not sure I found anything really clear on
12 that, but I want to ask if you think there's some case that
13 even indirectly suggests that you can't expand the universe
14 beyond the ministerial exception for this -- even on this issue
15 of religious hiring.

16 **MR. SEGAL:** Well, I think we have some data points,
17 which are that in the cases that the other side has cited, and
18 again, they are what I would refer to, at least, as edge cases.
19 They are usually very specific things that led courts to invoke
20 the church autonomy doctrine.

21 For instance, in the *Garrick* case or the *Aparicio* case,
22 you have a plaintiff, who regardless of whether or not they are
23 a minister, is actually advocating publicly against the
24 religious organization's ordination or installation of only men
25 in leadership positions. So it's essentially a protest against

1 ministerial hiring.

2 There's -- there's another case, the *Curay* case, where,
3 yes, the Court ultimately dismisses the claim on the basis of
4 church autonomy, but that's because what the Court is being
5 asked to do is compare the severity of different violations of
6 church doctrine.

7 **THE COURT:** So you would agree, then, from those
8 cases, that church autonomy does expand beyond the ministerial
9 exception, at least in some places? Because those places, as
10 you said, were not ministers or people in that category?

11 **MR. SEGAL:** It may in certain very limited instances.
12 But, again, what they are asking for here is not an expansion
13 into any particular limited instance. They are arguing that --
14 that categorically, the statute cannot be applied to them in
15 any of their -- what they refer to as mission --

16 **THE COURT:** Well, you're saying -- I mean, this
17 depends on the answer to my first -- or my earlier question. I
18 mean, if it's a facial challenge, yes, I agree with you. But
19 if they are accepting it as an as-applied challenge, or at
20 least in the alternative, why couldn't there be a
21 determination, if you're concerned about blanket rules, saying,
22 just as they've identified, there are some times in which
23 church autonomy goes beyond a ministerial category can be at
24 issue when someone other than a minister, or legally defined
25 minister, is at issue? And why couldn't they, as a matter of

1 fact, make the case that, at least pursuant to their own
2 sincere beliefs, the rule they are looking for, or something
3 close to it, applies as to them?

4 But that many religions don't take the same view of how to
5 operate. There are many -- many religious institutions have
6 people of different faiths working in their institutions. They
7 don't have a problem with this rule.

8 So does it really require a blanket rule? Or could it
9 just be that this particular institution's specific beliefs
10 warrant an ex -- you know, show that the doctrine, just as in
11 those other cases, this is one of those cases where we're going
12 to be asked to dig into their beliefs, but we don't need to say
13 that applies across the board because in many instances it's
14 not an issue?

15 **MR. SEGAL:** Well --

16 **THE COURT:** What would be wrong with that, I guess?

17 **MR. SEGAL:** Well, it seems like -- it seems an awful
18 lot like a blanket rule, at least to them -- at least as to
19 them. Seems to me like it is a blanket rule at least as to
20 them.

21 You compare it to these cases -- and, again, I'm not sure
22 there have been employment-related cases beyond ministerial
23 exception in the Fourth Circuit, but even as to the
24 out-of-circuit cases they are citing, we're talking about an
25 employee here or there based on a very specific fact pattern.

1 And, frankly, I think to be able to -- to claim an
2 organization-wide exemption for hiring and firing decisions
3 based on -- or excuse me, rooted in religious belief would go
4 well beyond that. And would, unfortunately, I think, create
5 all sorts of opportunities for mischief by organizations
6 claiming for -- for whatever purpose, that the decisions they
7 make are rooted in religious disbelief, regardless of whether
8 they are ministerial or not, and, thus, entitled to the
9 exception.

10 **THE COURT:** Okay. So let me ask you about -- let me
11 ask you the same question I asked Mr. Baxter about the
12 entanglement question.

13 I mean, they brought it up obviously in their complaint,
14 but you responded to it kind of following the same approach.

15 And I -- again, I'm trying to understand. I'm not saying
16 that we can't do it, but I'm concerned because of how *Lemon* has
17 turned out.

18 Do you see a path by which we should be conducting that
19 analysis even after *Kennedy* and other cases that have
20 undermined *Lemon*?

21 **MR. SEGAL:** So I think the state of establishment
22 clause law on this point is, as Your Honor's questions have
23 suggested, perhaps just a bit muddled.

24 As a practical matter, I think the entanglement questions
25 that they have raised fuse into some of the church autonomy

1 questions that they have raised. There are certainly cases out
2 there talking about church autonomy as rooted in the desire for
3 courts not to become unduly entangled in religious
4 institutions' decisions.

5 I'm not sure that -- that I would necessarily frame it as
6 an entanglement claim so much as an establishment-clause claim.
7 In the end, though, I don't think it particularly matters for
8 purposes --

9 **THE COURT:** So would you agree with me that -- and
10 again, I'm not saying I'm taking this position because I'm
11 still gathering information, but it's hard to see a world in
12 which the church autonomy claim fails but somehow this
13 entanglement theory succeeds.

14 **MR. SEGAL:** I would agree with that.

15 **THE COURT:** It feels as if they are very similar, and
16 maybe you can say -- well, I don't know. But, I mean, that's
17 what I'm trying to determine, is how much daylight is there
18 between those theories, at least practically, even though,
19 obviously, they can cite to different language in different
20 cases.

21 Let me ask about free exercise then.

22 **MR. SEGAL:** Sure.

23 **THE COURT:** So Mr. Baxter has taken the view under
24 *Tandon* and others that really any kind of exception pretty much
25 moves us into strict scrutiny. From your brief, I can tell you

1 disagree with that.

2 One of your arguments is the one I put in front of him
3 about, well, some of these actually are facially neutral
4 exceptions that actually would benefit religious organizations,
5 either ones that are 15 members or less, or ones that have a
6 seniority system, or what have you.

7 I get the logic of it. Is there any authority supporting
8 that interpretation?

9 **MR. SEGAL:** Sure, there's language in *Tandon* itself.
10 *Tandon* refers to the question of -- and this is a quote, and I
11 regret, Your Honor, that I don't have the pin cite in front of
12 me. It is happily a very short decision.

13 The quote is whether they treat any comparable secular
14 activity more favorably than religious exercise, or whether,
15 this is another quote, secular activities are treated more
16 favorably than religious exercise.

17 Here, what is being treated, at least for purposes of
18 these motions -- and I'm not going to quarrel that it's
19 religious exercise. What's being treated more favorably than
20 religious exercise is activity that could be religious or
21 secular as long as it meets specified statutory requirements,
22 whether that's 15 people or less, or bona fide seniority
23 system, or private membership club.

24 **THE COURT:** Let me ask you about the private
25 membership club.

1 I think when I look on the spectrum, I see, as I mentioned
2 to Mr. Baxter, I see the bona fide occupational qualification
3 issue is a little bit different. It feels like that's just
4 sort of part of the definition of whether there's a violation
5 or not, but I'm not sure I have a clear handle on that.

6 It's pretty clear to me that the 15 members or -- or,
7 again, I don't know what the rules are, legally, I think I have
8 to look at what Mr. Baxter has referenced. That doesn't feel
9 as if it's really trying to disfavor a religion or even
10 actually does, even though -- except it might not need -- there
11 might not need to be intent.

12 The private membership one bothers me a little bit,
13 though. That seems like it's saying these are clubs or
14 organizations that for whatever reason we're exempting out,
15 feels like it's in the same category of the hair salons and the
16 movie theaters. It's a different kind of activity than
17 religious exercise.

18 And so that one feels different in terms of an exception.

19 **MR. SEGAL:** So I think I disagree with that, Your
20 Honor, for -- for a couple of reasons.

21 Number one, just to be clear, we're talking about the
22 organization, not an activity.

23 But, also, I don't think there is -- one can very easily
24 envision secular private membership clubs, or religious private
25 membership clubs in a way that I don't think you can envision a

1 secular hair salon versus a religious hair salon.

2 **THE COURT:** Maybe. But, again, you could find other
3 activities, that whether for that scenario or others, where
4 it's both, but clearly it's typically a secular activity.

5 So, I mean, what do you do with some exception for book
6 stores where probably 95 percent of book stores are just
7 secular book stores, but there are some that have a religious
8 focus, maybe even a religious purpose. Are you saying that
9 that would -- just the fact that there's one religious book
10 store out there would gut the whole exception -- or the whole
11 applicability of this exception?

12 Because my guess is most of the private membership clubs
13 are secular. I can understand there might be some that come
14 around to religious purpose, but, I mean, a lot of that
15 activity is going to be in the category of the religious
16 organization, so -- I mean, is it really just the case that --
17 you know, if you can find one religious example of these other
18 activities, that it doesn't -- the theory doesn't work anymore?

19 **MR. SEGAL:** I'm not sure if it's the case that if you
20 find one, but at least -- at least to my mind, there's certain
21 activities that you can look at and say these are totally
22 independent of whether -- these -- these activities are
23 activities that could not plausibly be religious. Again,
24 like --

25 **THE COURT:** So is that the standard, could not

1 plausibly be?

2 **MR. SEGAL:** Well -- well, on some level, it might be
3 a bit of a you-know-it-when-you-see-it. I think there's also a
4 meaningful distinction, though, between the examples given in
5 *Tandon*, which are very clearly tied to specific activities,
6 right? What happens in a hair salon? Well, you cut hair.
7 Versus private membership clubs, which could be doing any
8 number of things. They could have dinners, they could be
9 having religious services. There's -- there's no --

10 **THE COURT:** Well, let me ask you this. I mean, do we
11 need to look at the legislative history or the more specific
12 definitions of what those are? Because, I mean -- I mean, do
13 you know why they put that exception in? It seems to be -- you
14 know, the size issue seems pretty standard. It's like we're
15 just trying not to burden these big, small organizations, maybe
16 it's associational, I'm not sure.

17 The seniority system and the bona fide occupational
18 qualification, to me, those are basically shorthand for saying,
19 look, if this is what's going on, it's not really intentional
20 discrimination, this is -- there's a reason for this, and it's
21 just a shortcut to get us there.

22 The private membership club just looks like you're trying
23 to help out those guys, for some reason. And if that's the
24 case, why not help out the religious organizations? I mean,
25 what is the purpose of that if not just to say we're going to

1 cut you guys a break?

2 **MR. SEGAL:** So I'm not sure there's anything in this
3 record right now suggesting what the precise purpose of the
4 private membership club exception is.

5 You know, there certainly are areas of antidiscrimination
6 law. And my guess is that there are very similar carve-outs in
7 the context of federal law where certain things are carved out
8 as effectively private.

9 But, again, regardless of the exact reason why this is
10 placed in there, a private membership club can be a private
11 membership club that engages in all manner of different
12 activities. The statute certainly doesn't limit the definition
13 or limit eligibility for the exception to participation in any
14 particular kind of activity. And it really can, we
15 respectfully submit, be either religious or secular, unlike,
16 again, the hair salon where there's only one thing that you're
17 doing in that business, and that clearly is what was troubling
18 the Court so much.

19 **THE COURT:** Okay. I mean, again, I'll have to think
20 about this one, because I think you're -- I think you would
21 acknowledge that it doesn't -- it doesn't jump out as a clearly
22 secular activity, but it also -- or only secular activity, but
23 it also doesn't jump out as something that's commonly viewed as
24 equally likely to be religious or not.

25 I mean, it seems as if a lot of the religious activity

1 actually happens in the places that are on -- you know, covered
2 by the religious exception. I mean, to some degree, the fact
3 that we have this category for religious exception implies that
4 someone thought these were separate; otherwise, why not just
5 let it all happen under the private membership club context?

6 **MR. SEGAL:** Well, there's certainly overlap. There's
7 another exception, for instance, for religious schools. And
8 no -- and no doubt employees, or some of the employees covered
9 by that exception would also fall within the exception for
10 religious institutions. That's the reason for all of us being
11 here today.

12 **THE COURT:** Okay. Well, okay. So -- so if -- if
13 there is -- if any of these issues that they have raised
14 creates a problem for your side in the sense that something
15 like *Tandon* kicks in, you're still arguing that even under a
16 strict scrutiny standard, you would prevail, but maybe you can
17 articulate for me more clearly, what is the compelling State
18 interest here? How is it narrowly tailored? And is there any
19 authority that supports that decision even if it's by analogy
20 to this situation?

21 **MR. SEGAL:** So the compelling State interest is the
22 interest in preventing discrimination on the basis of religion,
23 and we would submit that this is narrowly tailored to that
24 interest because it is, indeed, a prohibition on discrimination
25 on the basis of religion.

1 **THE COURT:** And, again, I mean, obviously some of
2 these things might be in the eye of the beholder, but, I mean,
3 is there any -- have courts discussed this sort of issue,
4 particularly in the issue of -- in the category of
5 discrimination on the basis of religion? Or how compelling is
6 this interest? Or places in which that has trumped things
7 like, you know, freedom of expression, freedom of religion,
8 freedom of speech, something like that?

9 **MR. SEGAL:** So there are certainly -- there are
10 certainly statements, and we quote them in our briefs, about
11 the interest in preventing discrimination being a compelling
12 interest. But, obviously, we would very much prefer to not be
13 in the strict scrutiny world.

14 **THE COURT:** Okay. But you don't have a case that you
15 think at least illustrates how this would be a compelling
16 interest, even given the weighty issues on the other side of
17 the ledger?

18 **MR. SEGAL:** So I don't think I have something that
19 specifically addresses that kind of balance.

20 **THE COURT:** Okay. I also wanted to ask about the
21 question I asked Mr. Baxter about, sort of how much of this is
22 a purely legal question, how much of this is factual.

23 You're asking for dismissal of all the counts, even -- I
24 mean, presumably assuming that there's no grant of the motion
25 on the preliminary injunction, but the -- usually you don't

1 dismiss if there are potential factual disputes.

2 I mean, so you're asking for dismissal basically accepting
3 as true everything the plaintiffs have said about their own
4 beliefs, and so you don't see a need for discovery or anything
5 like that?

6 Let's go with that.

7 **MR. SEGAL:** Well, so -- so, yeah, certainly the
8 premise of our motion is that even taking all their factual
9 allegations as true, they haven't stated a claim. I think if
10 Your Honor were to deny the motion to dismiss, there may well
11 be matters on which discovery would be warranted. But I would
12 not envision it as a particularly discovery-heavy case.

13 **THE COURT:** So you might just want to verify that
14 these are the beliefs, or if there's some nuance that you want
15 to try to see where things are, you might try to explore that,
16 but --

17 **MR. SEGAL:** That's one possibility, certainly.

18 **THE COURT:** Okay. But for purposes of the motion,
19 I'm just supposed to assume this is all true, correct?

20 **MR. SEGAL:** Yes.

21 **THE COURT:** Okay.

22 **MR. SEGAL:** Subject, of course, to the qualifications
23 set forth in cases like *Twombly* --

24 **THE COURT:** Sure.

25 **MR. SEGAL:** -- and *Iqbal*, which require plausibility.

1 But yes.

2 **THE COURT:** Okay. Are there -- actually, one other
3 question. I think this bona fide occupational qualification
4 issue did arise.

5 Are you aware of anyone ever using that in a way to say
6 that there is a religious qualification for something, so --
7 certainly -- certainly seems to me that if a minister were
8 to -- again, we're getting into that land again, if someone
9 said we're hiring a minister, they need to be of this
10 particular faith, we have an exception for that; but even if we
11 didn't, it would probably be a bona fide occupational
12 qualification.

13 So, I mean, do you agree with that, or could be --

14 **MR. SEGAL:** I think that would likely -- I think that
15 would likely be correct.

16 I think taking the point that Your Honor has just made a
17 little more broadly, I think that the existence of the
18 ministerial exception might make the bona fide occupational
19 qualification piece of the statute, which, of course, has
20 its -- has its corresponding provision in Title VII, less
21 relevant than it might otherwise be.

22 But the point that I just want to reinforce, though, with
23 respect to the bona fide occupational qualification, is that
24 unlike the exemption system in *Fulton*, which -- which is what
25 led the Supreme Court to hold that the City of Philadelphia's

1 provisions were unconstitutional, or at least that the
2 plaintiffs were entitled to an exemption, the bona fide
3 occupational qualification exception is not something that
4 anyone in Maryland state government can grant or deny. It's,
5 you know, part of the case to the extent that the parties place
6 it in issue that would have to be determined ultimately by a
7 fact finder.

8 Again, it's very different from the *City of Philadelphia*
9 case, *City of Philadelphia v. Fulton*, where there was an actual
10 person in Philadelphia government to whom you could go and say
11 I would like an exemption from this requirement, and that
12 person would be empowered to grant it or not grant it.

13 **THE COURT:** Okay. Fair point.

14 I guess what I was trying to get at was whether that --
15 have you ever seen that applied outside the ministerial
16 context? Because I think in theory, it could. This is a
17 matter of statute, not constitutional. And someone could say,
18 well, as maybe the plaintiffs here would say, well, you know,
19 for some of our jobs, maybe all, but certainly some of them,
20 they could identify that aren't ministers, we think this is a
21 qualification that's bona fide, and we're prepared to prove it
22 factually that under our specific circumstances, you know,
23 being of this religion is a bona fide occupational
24 qualification.

25 Have you ever seen that? Or do you accept that that could

1 happen on a factual case-by-case basis?

2 **MR. SEGAL:** Standing here today, I don't see any
3 obvious reason why an employer could not attempt to make that
4 argument as a factual matter.

5 I can't -- I am not sure that it's something that I have
6 seen done, however.

7 **THE COURT:** Okay. I'm not sure I have either.
8 But -- okay.

9 Now, again, I've covered some ground. Are there things
10 that you wanted to raise that you haven't yet had the
11 opportunity to raise?

12 **MR. SEGAL:** Yeah, just a couple of quick points.

13 One, there was some reliance on the *NLRB v. Catholic*
14 *Bishop* case, and as sort of the cornerstone of the church
15 autonomy doctrine. And I just want to direct the Court's
16 attention, this is consistent with what I was saying earlier
17 about the doctrine to the extent that it goes beyond the
18 ministerial exception in the employment realm really is limited
19 to very specific circumstances.

20 The Court in that case was not opining on -- on whether or
21 not the NLRB, as a constitutional matter, could exercise
22 jurisdiction over religious organizations because they were
23 religious organizations. It actually went out of its way to
24 emphasize -- and I'm just looking for the precise quote here.
25 I believe it is -- yeah, it's the critical and unique role of

1 the teacher in fulfilling the mission of a church-operated
2 school.

3 And then I recognize that there has not, to this point, I
4 think, been any discussion of the preliminary injunction
5 factors other than likelihood of success on the merits. But,
6 you know, because we are the defendants, and the plaintiffs are
7 seeking a preliminary injunction, I guess I would just point
8 out that they have not pointed, in our view, to any harm that
9 is imminently likely as a result of the statute not being
10 enjoined in its application as to them. They quote a fairly
11 inchoate, I would say, fear of liability. But that is really
12 it. They don't say that this fear of liability has led them to
13 do anything different.

14 Quite the contrary, their pleadings make clear that they
15 are, indeed, proceeding with the same mission-aligned hiring
16 practices that they have adhered to in the past.

17 **THE COURT:** Okay. But what about just the broad
18 concept which I think some cases support that a -- if there's a
19 likely constitutional violation, that may be enough at this
20 stage?

21 **MR. SEGAL:** Well --

22 **THE COURT:** If it's a First Amendment violation or
23 similar right.

24 **MR. SEGAL:** Well, again, I -- in the normal case, you
25 are talking about a plaintiff who is being chilled from

1 undertaking some form of religious exercise or speech -- pick
2 your category of First Amendment right, I suppose.

3 And what they pleaded is that far from being chilled in --
4 in undertaking mission-aligned hiring practices, they are
5 continuing to do what they had previously done.

6 And -- and, again, the requirement in the Fourth Circuit
7 is that the harm be not only irreparable, and, you know, I
8 certainly grant the point that constitutional violations do
9 generally amount to irreparable harm, but it has to be imminent
10 and likely, and we respectfully submit that they have not made
11 that showing here.

12 **THE COURT:** Well, is it -- is it the defendants'
13 position that -- or would they be willing to take the position
14 that they are not going to enforce this against the plaintiffs
15 during the pendency of the case?

16 **MR. SEGAL:** We can't take that position here.

17 **THE COURT:** Okay. Okay. Anything else?

18 **MR. SEGAL:** Thank you, Your Honor.

19 **THE COURT:** All right. Thank you.

20 Mr. Baxter, I think overall we spent more time together,
21 but as I said, since at least on the preliminary injunction,
22 it's your motion, so if there's any one or two quick points you
23 want to respond to Mr. Segal on, we can discuss those.

24 **MR. BAXTER:** Yes, Your Honor. If I could just -- one
25 thing, as a matter of procedure, I wanted to clarify, that the

1 *NLRB* case does cite *Lemon*, but the *Everson* case from 1947, so
2 25 years before *Lemon*, cautions against entanglement, and the
3 Supreme Court has continued to caution against entanglement in
4 cases like *Carson v. Makin*, which were decided after the shift
5 in the establishment clause.

6 I would just like to hit a couple of arguments, Your
7 Honor. One, I think the *Tandon* decision itself describes how
8 this Court should do the analysis. It says if there is, quote,
9 any, and it's italicized by the Court, any comparable secular
10 activity more favorable than religious exercise, it triggers
11 strict scrutiny, it is no answer that a state treats some
12 comparable secular businesses or other activities as poorly as
13 or even less favorably than the religious exercise at issue.

14 The question is, is the Court's application of its
15 interest generally neutral and generally applicable.

16 If it's not, it doesn't mean the religious plaintiff
17 always wins, but it means that the government has to show why
18 it can give some -- a bunch of exceptions, exceptions that
19 allow the most invidious type of discrimination for most -- 80
20 percent of employees in the state of Maryland, but it can't
21 allow a religious organization to engage in religious hiring.

22 As far as strict scrutiny on that point, there's no way
23 that they can satisfy that there is a compelling reason to
24 stopping religious organizations from engaging in religious
25 hiring. That's what religious organizations and other

1 ideological organizations do. There's nothing invidious about
2 religious organizations doing religious hiring.

3 **THE COURT:** Can I just clarify, maybe this is
4 connected or not, but I'm looking back at the language of --
5 let me see if I can find the exact language here.

6 I'm not finding it. Hold on one second here.

7 Okay. I'm having trouble finding it. Go ahead with your
8 next point.

9 **MR. BAXTER:** Yes, Your Honor. I just also wanted to
10 make -- so again, no compelling interest for an action that's
11 not invidious. There's a history, 60 years, in Maryland,
12 expressly allowed it. Before that, there was no prohibition
13 against religious hiring. So since the founding of our nation,
14 religious organizations have been allowed to engage in
15 religious hiring. There's nothing invidious about that that
16 could justify a compelling government interest in overriding
17 it.

18 The government has also made the argument that we're
19 asking for very broad relief that would allow for all kinds of
20 discrimination. We're not asking for that. All we're asking
21 for, very narrowly, if it would just allow the law as it's
22 always existed to be applied to us so it would allow us to
23 engage in religious hiring.

24 They may be nitpicking at things we've said in our brief,
25 but our proposed order, our request for relief are all just

1 focused on allowing us to engage in religious hiring.

2 And all of the prior types of claims that could have been
3 brought under the old law would still be able to be brought.
4 We're not asking for some kind of dramatic relief that would
5 change the scope of what religious organizations have always
6 been allowed to do.

7 Finally, on the harm argument, the government is confusing
8 standards here. They are trying to bring a standing argument
9 into this irreparable harm. There's not a single case -- I
10 couldn't find -- none of the cases they cited, I couldn't find
11 a single case where a court has found a likelihood of success
12 on the merits on a constitutional claim, and done anything but
13 say that irreparable harm automatically follows.

14 There may be cases where there's a laches defense, or
15 where there's been prejudice to the other side, none of which
16 has been alleged here.

17 But there's nothing -- in fact, if you look at the *Yakima*
18 decision where the Western District of -- or the Eastern
19 District of Washington was addressing, you know, almost the
20 exact same type of claim, the Court said that the fact that
21 the -- that the organization was committed to continuing its
22 hiring practice satisfied the first prong of an injury because
23 in a pre-enforcement context, under the *Susan B. Anthony*
24 decision, the first decision is you have to show that you're
25 likely to engage in activity that is affected by a

1 constitutional interest.

2 And the Court said that when you said I'm going to keep
3 doing what I've always been doing, that that actually helps
4 satisfy the injury prong in a pre-enforcement context.

5 And here, there's no question the government has
6 refused -- you know, the courts have also said consistently
7 that a refusal to disavow enforcement is indicative.

8 The Attorney General has made numerous statements
9 including filing an amicus brief between public statements,
10 saying they intend to enforce the law. And they are currently.
11 The Commission has indicated every year, it looks at postings
12 to see if they are in violation of the law.

13 The -- I would also just point Your Honor --

14 **THE COURT:** Can I just ask, as a practical matter, I
15 know it's a very large organization, but in Maryland, which is
16 where I assume the defendants would try to enforce this, how
17 many -- how many positions would you normally post in a given
18 year that are in Maryland?

19 **MR. BAXTER:** I mean, Maryland is the world
20 headquarters for the Seventh-Day Adventist Church, so I don't
21 know how many postings there are in a year, but it's -- a huge
22 number of its employees live and work in Maryland.

23 I would point Your Honor to the *Bryant v. Woodall* decision
24 in the Fourth Circuit, which is 1 F.4th 280, 285, which
25 addressed a similar pre-enforcement issue. And a law that

1 hadn't been enforced for nearly 50 years, but there was an
2 amendment to the law, and the Court said so long as the threat
3 was not imaginary or wholly speculative, that was sufficient.

4 If laws under a -- recent typically present a credible
5 threat, the Court presumes that a legislature, or here, the
6 Maryland Supreme Court, would not have enacted a law with the
7 intent that it would not be enforced.

8 So all of these, I think those are standing principles
9 which they haven't even questioned standing.

10 On the question of irreparable harm, there's not a single
11 case that would -- that would suggest that the Court could find
12 anything but irreparable harm has happened if there's
13 likelihood of success on the merits, which we -- which I think
14 that we have shown.

15 Just in closing, Your Honor, this is about a religious
16 organization's ability to hire people who believe its faith to
17 carry out its tradition. And to be able to say we're not going
18 to hire atheists or Muslims or others who don't believe in our
19 faith -- their whole purpose is to propagate their faith and to
20 set an example of why they believe their teachings will bless
21 their followers.

22 And if they are forced to change their very -- the Supreme
23 Court in *Amos* said it's how they define their character by who
24 they hire.

25 And forcing courts [sic] to hire individuals who do not

1 belong to their faith and accommodate even their other
2 religious practices would violate both the church autonomy case
3 doctrine and the free exercise --

4 **THE COURT:** You just said something that goes back to
5 the question I was going to say. I just want to be very, very
6 clear about what you're asking for here.

7 You said -- and you -- you shouldn't force them to hire
8 individuals who do not believe in their faith, and
9 accommodating their other religious practices. So it's that
10 second part I'm not sure I understand what -- what are you --
11 what aspect of a ruling are you looking for in that?

12 So as I understand it, I mean, we're just looking at the
13 language of MFEPA. You're saying it's unconstitutional.

14 And in particular, it's the interpretation of, you know,
15 work connected with the activities of the religious entity as
16 meaning anything other than all activities. And I think that's
17 what the statutory prong you're concerned about is.

18 But the language says, you know, it does not apply to a
19 religious corporation, association, educational institution or
20 society with respect to the employment of individuals of a
21 particular religion, sexual orientation, gender identity or
22 military status to perform work connected with the activities
23 of the religious organization -- religious entity.

24 Now, you're just arguing -- we're not trying to rewrite
25 the interpretation of the statute. You're just trying to say

1 whatever they've said now is unconstitutional as to the
2 religious piece.

3 So first question is, you're not asking for a ruling that
4 it's unconstitutional as to the ability of a religious
5 corporation to -- with respect to employment of people of a
6 particular sexual orientation, gender identity or military
7 status, or are you?

8 Because the particular religion part, hiring people of
9 your own religion, is what I thought this case was about. Are
10 you also saying that you want to say it's unconstitutional to
11 interpret this in a way that allows -- that does not allow
12 religious corporations to discriminate on the basis of sexual
13 orientation, gender identity or military status?

14 **MR. BAXTER:** So yeah, I'm glad you asked, Your Honor.

15 The religious exemption, as it's written, nobody is
16 challenging as it's written. And even the Maryland Supreme
17 Court acknowledges that in many instances, religious
18 organizations would be exempt from the nondiscrimination law
19 entirely even if for some non-ministerial positions --

20 **THE COURT:** Right.

21 **MR. BAXTER:** -- even when it comes to hiring and
22 firing on the basis of religion, sexual orientation or gender
23 identity.

24 What the Maryland Supreme Court has -- what we're
25 challenging is the Maryland Supreme Court's gloss on that rule,

1 which says that the exemption doesn't apply at all for some
2 category of employees of the church.

3 **THE COURT:** Right.

4 **MR. BAXTER:** And for that category, the church would
5 be -- that means if the exemption doesn't apply, then religious
6 organizations have two obligations that are placed on them.
7 They can't discriminate in their hirings, so their postings,
8 their hirings, their firings, on any of the protected
9 categories.

10 If -- and second, they have to -- there's also obligations
11 under Maryland law that they have to accommodate people, you
12 know -- within reason, they -- they have to accommodate --

13 **THE COURT:** So just tell me yes or no, are you trying
14 to say that -- because, again, the language obviously applies
15 to all four categories, but your constitutional challenge
16 doesn't have to apply to everything.

17 You could say, like, we're challenging the fact that we're
18 not allowed to discriminate on the basis of a particular
19 religion, which is what I thought you were saying.

20 **MR. BAXTER:** Not --

21 **THE COURT:** Are you also saying we also want to be
22 able to discriminate on those other three bases, too, as a
23 matter of the First Amendment?

24 **MR. BAXTER:** I think -- those -- those -- the
25 language you're reading is what we are allowed to -- we already

1 are allowed. That is the exemption for religious
2 organizations. Religious organizations can base hiring on
3 religion --

4 **THE COURT:** For people who are not in that last
5 category of workers. Your argument is about that last category
6 of workers.

7 **MR. BAXTER:** Right, then they don't have any
8 protections, they don't have any exemptions.

9 **THE COURT:** Right. And you want to basically get a
10 protection back via the Constitution, right? Via the First
11 Amendment to say that their interpretation cannot be reconciled
12 with the Constitution, I thought, as to the part that relates
13 to the particular religion?

14 **MR. BAXTER:** Right. We're asking -- we're saying --

15 **THE COURT:** And that's all I thought this case was
16 about. And if it's about more than that, I want to know that.

17 **MR. BAXTER:** Well, let me -- let me try to be clear
18 on this, because there are some categories where there's a
19 dispute about whether it's religion or something else.

20 So, for example, if an individual -- if a church does not
21 hire on the basis of sexual orientation or gender identity for
22 religious reasons, and -- and the -- and the church says, I
23 fire you for this reason, and the employee agrees, I was fired
24 for that reason, and that's a religious belief of the
25 organization.

1 **THE COURT:** Well, okay. So you're saying you want
2 the whole thing, is what you're saying?

3 **MR. BAXTER:** If -- if there is a sincere religious
4 reason. Not -- there's not always a sincere --

5 **THE COURT:** But this statute doesn't say that. It
6 doesn't say you're exempt if -- it's respect to employment
7 of -- employment based on religious belief of -- it says it's
8 based on the employment of individuals of a particular
9 religion.

10 Obviously, there may be other protections including
11 constitutional arguments that you can make. I'm just asking,
12 what is the argument in this case?

13 **MR. BAXTER:** Right. So as written, the religious
14 organization -- or the exemption -- let's say a religious
15 organization has no objection to hiring on the basis of sexual
16 orientation or gender identity. The exemption as written still
17 exempts them.

18 **THE COURT:** Not for every category of worker, though.

19 **MR. BAXTER:** Right. For that limited category.

20 No, it -- no, it does -- I'm sorry, it does for every
21 category. As written, it allows for every category.

22 **THE COURT:** I'm not sure that's right. It says -- it
23 says to perform work connected with the activities of the
24 religious entity. That same phrase that is troublesome for
25 purposes of the religious hiring of a particular religion

1 applies to all four of those, doesn't it?

2 **MR. BAXTER:** That phrase is not at issue
3 here because -- I'm sorry, can you just read that -- it says
4 the activities, whether they are religious or not.

5 **THE COURT:** The subtitle does not apply, I'm assuming
6 that is like this entire statute, does not apply to a religious
7 corporation, association, educational institution or society
8 with respect to the employment of individuals of a particular
9 religion, sexual orientation, gender identity or military
10 status to perform work connected with the activities of the
11 religious entity.

12 **MR. BAXTER:** Right. And it used to be of the
13 secular -- or the religious activities, and then that was
14 removed. So now it's any activities of the religious
15 organization.

16 So as written, the -- the religious exemption is already
17 broader than it needs to be to protect religious entities,
18 because there may be some religious entities that don't have a
19 religious objection to hiring on the basis of sexual
20 orientation but they are exempt from that category, which is
21 another example of how this law is not being -- why would those
22 churches be exempt, but -- but the Seventh-Day Adventist Church
23 can't have an exemption for religious hiring?

24 **THE COURT:** Let me -- let me frame it a different
25 way, because, again, as I read the language of this, what the

1 exemption for is when you're talking about employment of people
2 of a particular religion, basically saying you can hire people
3 only of your religion. And I thought that's what this case was
4 about. Or you could hire people only of a particular sexual
5 orientation, gender identity or military status, again, and you
6 can do that with the exception of this -- in this work not
7 connected with the activities, whatever that means, but it's a
8 non-zero category, according to the Maryland Supreme Court.

9 So --

10 **MR. BAXTER:** It says or --

11 **THE COURT:** So it seems like what you're trying to
12 argue for here, is that if I rule in your favor, not only can
13 you choose to hire people of a certain religion, but then even
14 for that very far-out category of people who are not ministers,
15 not in the middle category of people who are connected with the
16 activities of the entity, but also just for everybody in that
17 other category, that you can also -- it's not just about hiring
18 of a particular -- of people of a particular religion and being
19 of that religion, but it's also just for pretty much anything
20 that you can connect back to your religion, you can take
21 employment actions based on that, even if they interfere with
22 one of these other categories.

23 **MR. BAXTER:** Right. That's been the --

24 **THE COURT:** Like Mr. Segal's point of saying, well,
25 it's not just about hiring a particular religion, it's if our

1 belief is that our religion doesn't allow us to interact with
2 people of a certain race, religion -- race or other religion or
3 category, we can do that.

4 **MR. BAXTER:** So there's -- race is different for a
5 couple of reasons. One, there are other laws, for example,
6 Section 1981, which prohibit discrimination on the basis of
7 race and contracting, which includes hiring, for any reason
8 with no exception. So there's a neutral and generally
9 applicable law that wouldn't trigger strict scrutiny in that
10 context.

11 And the Supreme Court has -- and there's the *Bob Jones*
12 decision where the Court said that racial discrimination can
13 even override a religious -- upheld the IRS stripping the tax
14 exempt status of Bob Jones University because of its beliefs
15 that a student shouldn't engage in interracial dating or
16 marriage.

17 And so there's -- and that's based -- the Court has
18 emphasized that race is different because of our history with
19 race in the United States, the Fourteenth Amendment and other
20 constitutional provisions.

21 **THE COURT:** Let me just clarify that.

22 I mean, what you're saying, though, is if I rule in your
23 favor, either what you're asking for or whatever the ruling is,
24 you'll interpret it as saying that not only are -- should we be
25 allowed to hire anybody -- should we be allowed to have a

1 policy that we can only hire people who are officially members
2 of the Seventh-Day Adventist Church, but we can also make
3 decisions as to people of any other category, except maybe
4 race, based on our own religious beliefs for all categories of
5 people, that that's how you're going to read the ruling?

6 **MR. BAXTER:** That is the law that the Maryland
7 Legislature passed, and is the law that is upheld by the
8 Maryland Supreme Court, except for a tiny category of people
9 that it's going to decide which ones fall into and which don't.
10 It's been the law forever.

11 The religious organizations, under Title VII, if they
12 have -- they have to have a sincere religious reason; it has to
13 be religious, it has to be sincere, and it has to be
14 non-pretextual.

15 **THE COURT:** This doesn't say a religious reason.
16 This says a particular religion. So it's -- this doesn't say,
17 you know, based on religious belief or based on the beliefs of
18 the person. It says individuals of a particular religion.

19 So I'm not sure if you're referring to exactly how this
20 particular phrasing has been interpreted --

21 **MR. BAXTER:** For religion --

22 **THE COURT:** -- or whether you're talking about just
23 generally how they handled, you know, religious discrimination
24 claims or claims that, you know, might implicate things that
25 involve religion more generally. I'm not sure what you're

1 referring to.

2 **MR. BAXTER:** So, for example, the Title VII
3 exemption, which this was based on, defines religion as any
4 particular belief, practice -- I can't remember the exact
5 phrase, belief, practice.

6 But it does include -- so like it does include if someone
7 doesn't believe what you believe, if you are a religious -- a
8 Christian organization, you don't have to hire Muslims. If you
9 are a Christian organization that requires your employees to
10 obey the sabbath, you can refuse to hire even members of your
11 own faith if they are not obeying the sabbath.

12 So it's practice or belief. That's what the law has
13 always been in the United States, and continues to be under
14 this law, and -- and is an issue 80 percent --

15 **THE COURT:** Which case lays that out more
16 specifically in terms of the Maryland -- the way Maryland has
17 looked at this? Maybe I can get my -- my understanding through
18 that.

19 **MR. BAXTER:** I think let's look first at the fact
20 that the Maryland exemption says 80 percent of employees in
21 Maryland aren't protected against racial discrimination. So
22 the law --

23 **THE COURT:** No, no. I'm just looking for -- you're
24 saying the law has always been, you said, that if you're
25 allowed to discriminate on the basis of someone's religion,

1 that also means you can pretty much say if our religion says
2 that we don't want somebody of a certain background or type, we
3 can do that.

4 Which case says that? I'm just trying to understand that.

5 **MR. BAXTER:** Again, the cases have not been
6 litigated.

7 **THE COURT:** Well, then, you said it's been the law
8 forever, so give me what authority says that other than you.

9 **MR. BAXTER:** Every -- every decision that's ever
10 addressed this issue has deferred to the religious hiring
11 practices as long as they are sincere -- so even in -- there
12 are a lot of cases, for example, the example I gave before,
13 where an individual is fired for pregnancy outside of marriage.

14 **THE COURT:** Which case is this, again?

15 **MR. BAXTER:** I would have to pull exact cases, but
16 there are cases in almost every jurisdiction that kind of deal
17 with this type of issue, where the courts say they will allow a
18 pretext analysis.

19 So the church might come in and say, I have a religious
20 reason for doing this. I require all of my employees to live
21 our standards regarding marriage and sexuality.

22 And the employer -- employee has the option to come in and
23 say, that's not true.

24 Look at all the ways they have not enforced that law.
25 They have the opportunity to show -- produce evidence. They

1 have the initial burden to produce evidence of pretext, so the
2 church is not being consistent or telling the truth.

3 The church then has the burden to show that
4 its religious --

5 **THE COURT:** Okay. I think -- I've heard this before.
6 I think we're just going in circles. I'm going to have to
7 obviously figure out the answer to this myself because I don't
8 think I'm communicating my question clearly enough.

9 Okay. Anything else?

10 **MR. BAXTER:** No, Your Honor. I would just say a
11 religious organization's beliefs and practices have to be
12 included for it to live out its mission. It's part of how it
13 defines itself, and the First Amendment protects that. We
14 would ask the Court to grant the preliminary injunction and
15 deny the motion to dismiss.

16 **THE COURT:** Okay. Thank you.

17 So as I said -- I mean, I think we've been going at this
18 for a while.

19 Mr. Segal, I think the way I would look at that is you
20 have -- you filed a motion to dismiss, so if you want to add
21 anything just on those issues, but not really on the
22 injunction, you can do that. Or you can rest where you are,
23 whichever you prefer.

24 **MR. SEGAL:** I'll be very brief.

25 **THE COURT:** Okay.

1 **MR. SEGAL:** Just a couple of very quick points in
2 response to counsel for the plaintiffs.

3 One, just going back to *Tandon*, there was some language
4 quoted to the effect that it doesn't matter that the policy
5 treats some secular activities equally unfavorably to religion.
6 I don't read that language as referring to the scenario that we
7 have here with respect to the Maryland statutes' exemptions, in
8 which a particular activity can be either secular or religious.

9 I read it, rather, as referring to a scenario in which a
10 defendant is saying, well, yes, we granted an exemption for the
11 hair salon, but we didn't give an exemption for the baseball
12 game, so we win.

13 So that's just one very quick point.

14 **THE COURT:** Okay. I understand.

15 **MR. SEGAL:** One point on *Tandon*.

16 And then just I'm not quite sure exactly where we've
17 landed with respect to the relief that the plaintiffs are
18 seeking here.

19 **THE COURT:** I'm not sure either. That's what I was
20 saying.

21 **MR. SEGAL:** And -- and, Your Honor, their request for
22 relief says what it says.

23 But the constitutional theory on which they are basing
24 their request for relief, right, that is "the Constitution
25 requires this relief because," what they have said is that the

1 decisions that a religious organization makes with respect to
2 employment are -- are not subject to judicial intervention as
3 long as they are rooted in religious belief.

4 Again, whether or not that extends to the specific nature
5 of the relief that the plaintiffs are -- are requesting is, in
6 some sense, a little bit beside the point, because the
7 constitutional theory on which they are basing their request
8 for relief is one that, in our view, really would not preclude
9 its opportunistic application to all matters, situations going
10 beyond the one before us.

11 **THE COURT:** So what you're saying is -- because,
12 again, that's what I -- I came into the hearing thinking they
13 were asking to be able to hire people of their own religion.
14 It seemed quite reasonable.

15 Now it sounds like they want to be able to do whatever
16 they want so long as they can connect it to religion in some
17 form. Now, maybe that -- and you're saying that naturally
18 flows or doesn't flow from that --

19 **MR. SEGAL:** No.

20 **THE COURT:** -- from their theory?

21 **MR. SEGAL:** Yes. I guess what I'm saying -- and I
22 apologize, Your Honor, if I wasn't clear about this earlier.

23 Whatever they are asking for as a scope of relief, they
24 are resting it on a constitutional theory that says a religious
25 organization's hiring and firing decisions are protected as

1 long as they are rooted in religious belief.

2 **THE COURT:** Okay. I think you're right. I mean,
3 that is kind of -- okay. So I guess that's where we are.

4 Okay.

5 Anything else?

6 **MR. SEGAL:** No, that's it, Your Honor. We just
7 respectfully ask Your Honor to deny the PI motion and grant the
8 motion to dismiss.

9 **THE COURT:** Okay. So I think I'll take the matter
10 under advisement. I know it's a preliminary injunction motion,
11 so we'll move as quickly as we can.

12 But as you both have identified, there's a lot of
13 complicated issues here, a lot of different theories that have
14 been offered that we need to dig through.

15 So I wanted to ask, though, is there anything else, since
16 we're all here, in this case, that should be discussed or
17 should be noted at this point? You know, and I -- sometimes at
18 this juncture, it's things like, well, you know, maybe we would
19 like to go to a mediator, or there's settlement discussions
20 going on, or something else might happen outside of the case
21 that might affect what we're doing, or our timeline.

22 Is there anything else that we should discuss, or is it
23 just waiting for the ruling?

24 **MR. BAXTER:** Not that I can think of, Your Honor.

25 I would like to respond to one point that he made on

1 our --

2 **THE COURT:** Everybody had two rounds. We are done.

3 **MR. BAXTER:** Thank you.

4 **THE COURT:** Anything else, Mr. Segal?

5 **MR. SEGAL:** Nothing from us.

6 **THE COURT:** Okay. Thank you very much. We'll let
7 you know when we have a decision.

8 **DEPUTY CLERK:** All rise. This Honorable Court now
9 stands adjourned.

10 (Proceedings were concluded at 4:22 p.m.)

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4 I, Paula J. Leeper, Federal Official Court Reporter, in
5 and for the United States District Court for the District of
6 Maryland, do hereby certify, pursuant to 28 U.S.C. § 753, that
7 the foregoing is a true and correct transcript of the
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Federal Official Reporter

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